No. 17-269

IN THE

# Supreme Court of the United States

STATE OF WASHINGTON, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AND CENTRAL NEW YORK FAIR BUSINESS ASSOCATION AS AMICI CURIAE SUPPORTING PETITIONER

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## INTEREST OF THE *AMICI CURIAE*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. Central New York Fair Business Association (CNYFBA) is a member organization of CERA and is incorporated as a non-profit in Oneida, New York. CERF and CNYFBA are primarily writing this *amici curiae* brief to explain why the Ninth Circuit expansion of the federal reserved rights doctrine in this case exceeds the role of judicial review under the Constitution that was primarily designed to protect the individual rights of the people to self-governance at both the state and national level.[1]

CERF submits this *amici curiae* brief to add the perspective of its members that the Constitution should apply to all persons in the United States. CERF firmly believes that the United States government should be promoting the interests of all of its citizens on an equal basis. Accompanying this *amici curiae* brief is a letter to lodge two newly located historic documents with

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1 Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amici curiae*, CERF, its members or its parent CERA's members including Central New York Fair Business, or its counsel have made any monetary contribution to the preparation or submission of this brief. Both parties have consented by letter to the filing of this *amici curiae* brief.

attachments CERF believes have never been seen by this Court. The memorandum "Respecting Federal Trust Responsibilities For Managing Indian Forests with Points and Authorities in Support" dated September 19, 1968 explains how William H. Veeder interpreted the Indian trust relationship created by this Court to alter separation of powers principles. Attached to this Memorandum is his synopsis of the Indian Trust Responsibility. The second memorandum is a comprehensive explanation with points and authorities from William H. Veeder that is the legal basis of the Nixon Indian policy. It is titled "Implementation of Memorandum Respecting American Indian Reservation Economic Development Retarded or Thwarted Through Abridgement or Loss of Indian Titles to Land and Rights to the Use of Water by Policies, Agencies and Personnel of the Federal Government." This very long memorandum dated May 14, 1969 explains how any physical thing that can be claimed for the Indians can be subjected to federal authority. Counsel will attempt to explain how these Memoranda by Veeder directly link to the fraud perpetrated on the Rio Grande fully discussed in the *amici curiae* brief submitted to this Court in support of the pending petition in *Sturgeon v. Frost*, Docket No.17-949 that initiated all of the federal reserved rights claims.

## SUMMARY OF THE ARGUMENT

This case is about the latest expansion of federal reserved treaty rights established in *United States v. Winans*, 198 U.S. 371 (1906). The very authority to interpret and continually reinterpret the treaties at issue over time comes from this Court's decision in

*Worcester v. Georgia*, 31 U.S. 520 (1832). CERF and CNYFBA assert that this Court did not have jurisdiction to take the case of *Worcester v. Georgia* under either its appellate or original jurisdiction and render a decision. CERF and CNYFBA take this position as the alternative means to correct the creation of the federal reserved rights doctrine. This Court can always correct its jurisdiction. The assertion of equity jurisdiction in the Supreme Court to create a specific federal trust relationship with Indian tribes created law that violates separation of powers and federalism. This Court never should have taken upon itself the authority to force the elected branches to act specifically to protect any one class of people against all others.

The "trust relationship" established over the Indians in *Worcester* and the national interest to protect the navigation servitude became the basis of the federal reserved rights doctrine in *United States v. Winans*, 198 U.S. 371 (1906) and *Winters v. United States*, 207 U.S. 564 (1908). The doctrine was established through deliberate fraud on the Rio Grande as evidenced by two legal memoranda written by attorneys of the United States Department of Justice. It was this fraudulent doctrine that was then turned into an absolute weapon against the States and the people by William H. Veeder to become what is now known as the Nixon Indian policy. Again CERF relies on the actual memoranda written by Veeder to make its assertions.

The control of the legal arguments regarding the Indians demonstrates there is a Madisonian faction of federal attorneys that knows all of the facts and history but does not disclose this information to the federal courts when presenting arguments. This Court can end this faction by curtailing its equity jurisdiction that

opened a separate Indian trust in the first place.

## ARGUMENT

CERF does believe that it is easier to articulate the concerns against the federal reserved rights doctrine in a water case than in a land case. The reason for this is the way the public trust doctrine was defined as a matter of separation of powers in *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845) and other old water cases. Because of the large waterways and extensive coastline in the Eastern states the division of authority over the waterways was considered and defined long before our Civil War. The early water decisions were also some of the earliest Commerce Clause decisions. This case is the result of the Ninth Circuit choosing to again expand the fraudulently made federal reserved water rights doctrine.

### I. IS THIS COURT WILLING TO STEP UP AND CORRECT ITS OWN MISTAKE?

The law we inherited from Great Britain completely separated the war powers from the domestic law. Either an area was under military jurisdiction or it was under civil jurisdiction. This was the most direct way to prevent the government authority to wage war from influencing or affecting the domestic authority to promote self-governance. In Great Britain this distinction was of particular importance because the domestic courts were separated into courts of law and courts of equity. All of the Colonies prior to the Revolutionary War were classified as British territories under military jurisdiction. Your individual status was determined by where and to

whom you were born as designated by British law. Under British law today there is still no legal means to judicially transition those born under the territorial military status of a Colony to becoming equal in status to those born within the British Isles. It is a primary tenet of British law that equity does not apply to any military proceeding convened under the direct authority of the sovereign government. British law establishes different types of British citizenship depending on where and to whom you were born. But Britain has also expanded the role of its domestic courts to hear both civil and military crimes. By placing the same judges and tribunals to decide the distinct types of law, the courts and the people are constantly reminded of the differences between military and civil statutes and the need to keep them separated. The application of Civil statutes including the criminal laws are still subject to interpretation using principles developed in the equity courts and the equitable defenses. Great Britain and most of her former colonies have managed to preserve their individual rights as their system of governance has designated by keeping the war powers and domestic powers separated. Britain has found a workable separation of powers balance that has preserved individual liberty under their system. According to the two Veeder Memoranda and the decision of the Ninth Circuit that will bankrupt the State of Washington in this case, the United States has utterly failed to keep the domestic laws and war powers separated in the federal courts.

Defining and limiting the authority to wage war was seen by the Framers as one of the most difficult problems in designing the structure of the Constitution. One of the most prominent members of the Constitutional Convention, George Mason of Virginia,

refused to sign the finished Constitution because he did not believe the document contained enough restriction on the federal authority to wage war given the slavery and Indian situations. These groups were situations because they were not "white." The authority to classify slaves as 3/5ths human and Indians not taxed as separate required treating them as potential enemies using military authority. These clauses also deliberately intermix the authority to wage war and the civil authority in order to create an opportunity for all people to become equal. From the beginning our Framers rejected the old British absolute classifications of an individuals status being decided at birth and attempted to create something new. Every person was to be allowed to employ their own talents to achieve whatever they made possible through their own work no matter whether they were born a slave, an Indian or an aristocrat. Even as slavery became the main cause of the Civil War the quest for equal protection or equal justice under the law grew as a principle and became the backbone of the Civil War Amendments.

The Framers of our Constitution because of this distinction in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis in a case that determined that States owned the bed and banks of a navigable waterway. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). The specific requirements set in that case became known as the American public trust doctrine. The public trust doctrine was meant to prevent the United States from

being able to use the territorial war powers as permanent domestic law against the States and individuals. The main concept was that the federal government could exercise plenary power over a territory but that upon the formal creation of the territory by Congress certain powers and ownership over the water would vest in the future state. This insured that all States would be admitted on an equal footing with the existing states. Before the Civil War Amendments and the end of slavery this was the only way to enforce the Framer's view that all people had to be equal before the law.

This discussion must also include how the Constitution itself divided the authority of deciding citizenship. The Constitution gave Congress the authority to create laws to naturalize all foreign persons that were not citizens of the States in which they resided. The Thirteenth Amendment forever banned slavery and involuntary servitude. The Fourteenth Amendment created national citizenship and deliberately withheld citizenship from all Indians not taxed.[2] This exception to what has otherwise become an inviolable principle of equal protection exists because this Court asserted it had appellate jurisdiction under principles of equity to deliberately oppose the elected branches in 1832 in *Worcester v. Georgia*.

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2 See Act of April 9, 1866, 39th Cong., Sess. 1, ch. 31 1866) (The "Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication" (approved April 9, 1866), declared that "all persons should be deemed citizens of the United States who were born in the United States, and not subject to any foreign power (excluding only Indians not taxed), including persons of every race and color, without regard to any previous condition of slavery or involuntary servitude...").

The Framer's did not know how the only Court specifically created under the Constitution, this Supreme Court, was going to function and deliberately left the creation of the federal judiciary and the rules of procedure to Congress and the courts themselves to work out. Article III, Section 2 sets out only the most basic jurisdictional requirements for actual cases or controversies before this Court. This Court is also declared to have both law and equity authority. The British blood punishment of Bill of Attainder was prohibited. Judicial review of laws is not even mentioned. It was left to Congress and the federal courts created by Congress to work out the details. Because Congress is supposed to set the laws that establish the jurisdiction of all federal courts except the Supreme Court itself, there is a tension between Congress and the Supreme Court over how to separate the powers over federal court jurisdiction. This tension was just examined by this Court in the case of *Patchak v. Zinke*, Docket No. 16-498 (Decided February 27, 2018).

The majority of the Framers believed that this deliberate intermixing of war and civil authorities was acceptable because they had designed a national government that made permanent the civil liberties and would require all "war or emergency" designations to be "temporary." They specifically applied this temporary versus permanent restriction in the Property Clause, Art. IV, Sec. 3, Cl. 2., to limit the federal authority to keep an area indefinitely under military jurisdiction by requiring the Congress to dispose of the territory. The Framers had also learned from British experience that government ownership of real property created jurisdictional issues and deliberately created the separate Enclave Clause for

this reason. Similarly, they understood from British law that government ownership also implicated commercial activities that touched upon or used government property and separated commerce from the ownership interests. These and other specific separation of power and checks and balances constraints were built into the Constitutional structure to prevent the war powers from being used as domestic authority. The Framers thought they had created a limited national government subject to a written statement of its authorities. In a separate Bill of Rights they imposed even more limitations on the national government and specifically reserved to the States and primarily the people all those powers not specifically conferred to the national government.

The Framers and this Court underestimate the power of the written constitution. The Framers debated whether and how judicial review would develop. Allowing principles of equity in the federal courts to fill in gaps in interpreting the constitution with its amendments, civil rights statutes and to protect specific liberty interests against the national government has worked. *Marbury v. Madison*, 5 U.S. 137 (1803) itself is just such a decision. The Court declared a law unconstitutional to resolve the case. What has not worked is when this Court using its equity authority has declared the law without any written constitutional provision or statute as its foundation. There is no worse example of this than the *Dred Scott v. Sandford*, 60 U.S. 393 (1857) decision in which the Chief Justice declared every contested written provision of the law unconstitutional to then create an equitable remedy for slave owners in all federal territories. CERF has many times explained to this Court how *Dred Scott v. Sandford* is the true

source of this unaccountable plenary power that is now supplanting all due process and liberty. The *Dred Scott* ruling lives on because *Worcester* is still the law.

That general judicial equity power was initially rejected in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Chief Justice Marshall refused to exercise it to engage in the review of the injunction then sought to preserve the Cherokee Nation's treaty right to occupy territory within the State of Georgia over which the United States asserted title, which this Court previously acknowledged in *Johnson v. M'Intosh*, 21 U.S. 571 (1823), because it would potentially be tantamount to recognizing "the existence of nations and States [...] possessing [aboriginal] dominion and jurisdiction *paramount to* the Federal and State Constitutions" (emphasis added) 30 U.S. at 49-50. The Court's general judicial equity power was, thereafter, first created in *Worcester v. Georgia*, 31 U.S. 520 (1832). In apparent deference to Justice Johnson's earlier dissent in *Cherokee Nation*, 30 U.S. at 69-70, Chief Justice Marshall proceeded to deliberately oppose the elected branches of government and to declare a federal trust relationship with the Cherokee Nation. Counsel is not going to get involved in discussing the Removal policy of 1830 or what led Chief Justice Marshall to make such a bold step. Counsel is only interested in what this judicially declared federal Indian trust relationship has become according to William H. Veeder and the federal attorneys who manufactured the federal reserved rights doctrine on the Rio Grande. This Court's decision in *Worcester v. Georgia* is unquestionably what breaks the written safeguards that were so carefully designed by the Framers to prevent the war powers from interfering with domestic law.

The *Worcester* opinion adopted the concepts of protection and trusteeship as more than "a mere moral responsibility." Chief Justice Marshall applied the law of nations as explained in the treatise of contemporary international law expert Emer de Vattel ("Vattel").[3] *See also United States v. Rogers*, 45 U.S. 567, 572 (1846) (referring to them as in "the spirit of humanity and justice"). In *Worcester*, this Court exercised its equity powers to acknowledge such responsibility as having been fulfilled previously by the British Crown in North America, and as having been thereafter inherited and assumed, initially, by the American colonies in the context of "defensive war," and ultimately, by the newly formed United States government following the Revolutionary War. *Worcester*, 31 U.S. at 543-551. Indeed, in *Worcester*, this Court cited Vattel's treatise as the basis for concluding that Indian tribes or bands could be considered 'sovereign' nations or states able to enter into enforceable treaties with independent sovereigns so long as they retained one facet of sovereignty – political and administrative self-governance. *Rogers*, 45 U.S. at 572; Vattel at 349-354. This Court construed these indicia as evidencing the dependent 'ward' status of the tribal nations to the United States.

This Court made the law in *Worcester v. Georgia* that completely separates the Indians from the rule of

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3 *See* Emir de Vattel, *The Law of Nations; or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Lieber Collection (Philadelphia: T. & J.W. Johnson, Law Booksellers (1844)); Emir de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Liberty Fund, 2008).

law established under the Constitution. In exercising its equity powers to adopt an Indian trust standard based on the law of nations this Court created and maintains the ultimate right of deciding how to interpret the federal trust relationship with the Indians and tribes. The *Worcester* Court found that Indian treaties executed by the United States are "the supreme law of the land" (Art. VI, Cl. 2) intentionally limiting federalism for the benefit of the Indian tribes. This Court in *Worcester* classified the status of the ground occupied by the Cherokee Nation in Georgia as federal Indian country breaking every written safeguard imposed in the Constitution and by statute under domestic law to prevent the war powers from being applied generally. These pre-Civil War cases laid the groundwork for this Court to authorize further federal government activities that displace constitutionally protected private property rights and State processes in favor of the aboriginal water, fishing and hunting rights of Indian tribes as the culvert case at bar amply demonstrates. [4] When Congress ended the treaty making era with the Indian policy of 1871, instead of this Court repealing the application of the law of nations to the Indians it decided that Congress could exercise plenary authority over them. This Court created the extra-constitutional authority over the Indians and then effectively delegated it to Congress in perpetuity. According to the memoranda cited in the next section of this brief, it took only a few years for attorneys working in the Executive branch to realize

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4 *See e.g., Baley v. United States*, 1-591-L (Fed. Cl. 2017), slip op. at 2, 16-17, 19-21, 45-46, 60-65, 70-74; The Kogan Law Group, P.C., *Summary of Write-ups for Western States Constitutional Rights, LLC* (2016).

how this Court lifted every constitutional restriction so that the United States could claim it had reserved rights to every interest ever granted or conferred.

Today all of the constitutional constraints on government power are irrelevant because this Court has failed to enforce them for more than a hundred years. This is what has happened to Mr. Sturgeon and is now happening to the State of Washington. Both have been blindsided by this asserted federal authority that claims the federal government can change the underlying basis of what law applies to the waterways and land to alter our rights. This Court is the only branch of government that can correct the mistake it made and declare anew that the power to alter the land status or avoid the application of equal protection can only be changed on a temporary basis for a real emergency like invasion or a major terrorist attack or natural disaster.

## II. THE FRAUDULENT DOCTRINE OF FEDERAL RESERVED WATER AND TREATY RIGHTS.

### A. The Fraud on the Rio Grande

After the Civil War, Congress changed federal Indian policy. The 1871 policy ended treaty making with the Indian tribes, and instead, "governed them by acts of Congress." *See* Act of March 3, 1871, ch. 120, ch. 120, § 1, 6 Stat. L. 566; *United States v. Kagama*, 118 U.S. 375, 382 (1886). This formally ended the assimilation policy of the Northwest Ordinance and began a much harsher and more expansive direct war power policy toward the Indians. *See* 25 U.S.C. § 71, Rev. Stat. § 2079; 43 U.S.C. § 1457 and § 1458, Rev.

Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004). The separate racial classification of "Indian" from *Dred Scott* v. *Sandford*, 60 U.S. 393 (1857) was deliberately preserved in the Indian Policy of 1871 as codified in the Revised Statutes of the Reconstruction era. The Indian policy of 1871 was based on simultaneous but seemingly inconsistent presumptions that, although "Indian tribes ha[d] ceased to be treaty-making powers and ha[d] simply become wards of the nation,"[5] Indians and Indian tribes would continue to be "recognized [...] in their tribal relations" and thus, as possessing the "rights and privileges" of potential (rather than actual) "belligerents" against the authority of the United States. 25 U.S.C. § 71, Rev. Stat § 2079.[6]

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5 *See* 3 Fed. Stat. Ann. (2d Ed.) 770 ("**Future Treaties with Indian Tribes** [...] **Relation of Indian Tribes to United States** – The Act of March 3, 1871, did not change the relation of the Indian tribes to the United States, but only changed the method of enacting laws for their government. *Ex. P. Morgan*, (1883) 20 Fed. Rep. 306. Since that Act the Indian tribes have ceased to be treaty-making powers and have simply become wards of the nation. *Brown v U.S.*, (1897), 32 Ct. Cl. 432.")

6 *Id.* ("**Future Treaties with Indian Tribes** [...] **Indians entitled to rights of belligerents.** – Congress has authority to govern the Indians by statute, instead of by treaty, but, having recognized them in their tribal relations until the Act of 1871, and by that Act declared that no obligation of any treaty made prior thereto should be thereby impaired, they are entitled, at least until otherwise provided by law, to the rights and privileges of belligerents, and the use of the word 'amity' in the statutes is, in effect, a recognition of such rights. *Leighton v. U.S.*, (1894), 29 Ct. Cl. 304. *Cf.* 25 U.S.C. § 72 ("**Abrogation of Treaties** - Whenever the tribal organization of any Indian tribe is in ***actual hostility*** to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done consistently with good faith and legal and national obligations. (R.S. §□2080)") (emphasis added).

This change happened because so many Indian tribes raised hostilities during the Civil War. Many Indian tribes formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used in "Indian country" to fight the Civil War and to Reconstruct the Southern states following the war.[7] *See also* War Powers by William Whiting (43rd edition) p. 470-8. This was exactly what Secretary of War Edwin Stanton argued for to forever prevent another civil war. Under the 1871 policy even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an

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7 *See* 3 Fed. Stat. Ann. (2d Ed.), *supra* at 806 ("'Indian country.' – Section 1 of the Act of June 30, 1834, ch. 161, 4 Stat L 729, was repealed by the Revised Statutes, and consequently the description of the Indian country found in that section is no longer a part of the law of the land. *U.S. v. Bridleman*, (1881) 7 Fed. 894; *Forty-three Gallons Cognac Brandy*, (1882) 11 Fed. 47. But the section may still be referred to for the purpose of determining what was meat by the term 'Indian country' when found in the sections of the Revised Statutes of the Act of 1834. *U.S. v. Le Bris*, (1887) 121 U.S. 278, 7 S.Ct. 894, 30 U.S. (L. ed.) 946. 'Indian country,' as used in the Revised Statutes, applies to all country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, except that within the boundaries of states, and it is embraces all territory within the boundaries of states, actually occupied by Indians and excluded by statute or treaty from state jurisdiction *Ex p. Crow Dog*, (1883) 109 U.S. 556, 3 S. Ct. 396, 27 U.S. (L. ed.) 1030; *Benson v. U.S.*, (1890) 44 Fed. 178 (1911) 29 Op. Atty.-Gen. 239" (emphasis added). Since the New Deal and World War II, however, the term "Indian country" has reappeared within the federal statutory framework. *See* 18 U.S. Code § 1151.

undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship *See Elk v. Wilkins*, 112 U.S. 94 (1884).

By the 1880's senior members of Congress were intentionally going around the 1871 Indian policy and trying to fulfill the promises that had been made to friendly Indian tribes under the original assimilation policy. *See Nebraska v. Parker*, 136 S.Ct. 1072 (2016). This attempt to return to the assimilation policy was incorporated into the Dawes or General Allotment Act of 1887. At the same time, many other members of Congress were more than hesitating to relinquish the essentially unlimited authority they possessed over Indians from the 1871 policy. This was the creation of the schizophrenic federal Indian policy that still exists today.

It was not only Congress that was beginning to relish this virtually unlimited authority over the Indians and explore new possibilities of applying it. According to the historical documents from the Rio Grande, multiple federal attorneys in the Departments of State, Interior and War were also seeing the possibilities. Whether it was the attorney bureaucrats or their Secretary bosses that wanted to expand this power, federal officials at the upper levels were beginning to understand that the application of this power over the Indians could be used and developed for other purposes.

The Memorandum titled "The Embargo on the Upper Rio Grande" by Ottamar Hamele is a confession explaining what the United States did on the Rio Grande to cheat the Rio Grande Dam and Irrigation Company out of the right of way it had been granted under the statute of March 3, 1891, 26 Stat. 1095, to

build the Elephant Butte Dam on February 1, 1895. The memorandum explains step by step how the Mexican complaints were denied but then apparently applied on moral grounds.[8] The result was a letter from the Secretary of the Interior dated December 5, 1896 to the General Land Office declaring an embargo and suspending all further applications for rights of way in Colorado and New Mexico. While the Secretaries of State, Interior and War all are named in this Memorandum as well as the Attorney General, no mention is made of any contact or decision of the President or any member of Congress to authorize the suspension of the Congressional statute of March 3, 1891, 26 Stat. 1095. The claimed justification for the embargo is to negotiate a future water treaty with Mexico. When the treaty negotiations faltered, the Secretary of State questioned whether the Rio Grande was a navigable river and requests another Attorney General's opinion on the subject. Even with the change of presidential administration the opinion is issued assuming the Rio Grande is a navigable river at Elephant Butte despite all of the upstream diversions of water that had already greatly depleted its flow. As described in the section entitled "Litigation with the Rio Grande Dam and Irrigation Company" twice the trial court and the Territorial Supreme Court dismissed the federal complaint finding that the Rio Grande was not navigable. Twice, the United States Supreme Court reversed requiring that more evidence be taken in the case to give the United States additional opportunities

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8 The Hamele Memorandum has no page numbers. It is divided into sections by captions explaining the various actions that were taken. The section relating to the above statement is "Agreement of May 6, 1896."

to stop the construction. Finally, the United States changed its position and argued that the right of way to build the dam had only been granted for 5 years and that time had expired. This argument was finally accepted and ended the possibility of the construction of the storage dam by the Company.

As the Hamele memorandum explains just a few years later the United States announced it would build a larger water storage dam at Engle, New Mexico attached to the Elephant Butte bluff. Only this federal reclamation project now came attached with all the changes in federal law deliberately manufactured by the United States. Most notably, that the United States claimed actual ownership of all of the unappropriated water of the Rio Grande for its project as detailed in the memorandum and its attachments. Lastly, although nicely stated, the end of the Hamele memorandum explains that the Rio Grande Compact Commission was convened and agreed to by the three States as the only means by which the United States would finally release the embargo order on the Rio Grande. The States had no choice but to accept the terms of the United States as to how their rights had been altered by the fraud and could potentially lose their water rights if they opposed the de facto fraud of the United States.

### B. The Abuse of the Navigation Servitude

While the admitted to facts regarding the embargo on the Rio Grande are revealing they do not explain how the federal attorneys turned the navigation argument that failed in the Rio Grande dam cases into the completely unaccountable power it has become today to create the present case. It requires a reading of the second memorandum on Federal Irrigation

Water Rights to see just how abusive the navigation doctrine became by being combined with the war power to issue the embargo on the Rio Grande. While counsel could contest the various points made in this memorandum, for purposes of this case at the petition stage counsel will not do so but will allow the written memorandum to speak for itself. It is more important that this Court realize what the claimed federal authority really is. Counsel reminds this Court that this is a Memorandum dated January 22, 1930 and that the United States undoubtedly claims more than this today. The reasoning in the 1930 memorandum is more detailed than the reasoning applied by the Ninth Circuit. The difference is that the 1930 memorandum tries to justify or interpret how separate constitutional powers were combined from the fraud on the Rio Grande to claim ownership of all water while the Ninth Circuit erroneously assumes that the Commerce power always included these other constitutional powers.

Attorney Ethelbert Ward states that the federal reserved water rights doctrine was established when this Court opined that "Although this power of changing the common law rule as to the stream within its domain undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a State by its legislation cannot destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its water so far at least as may be necessary for the beneficial uses of the government property..." *U.S. v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 703 (1899). See Memorandum titled "Federal Irrigation Water Rights" by Ethelbert Ward, dated January 22, 1930, bottom of p. 3. As made clear by the exhibits to the Embargo of the Upper Rio

Grande memorandum, the recognition by this Court of the rights of the United States as the owner of lands bordering on streams was immediately put into effect against the Territory of New Mexico. A claim to all of the waters of the Rio Grande within the Territory was made and filed to the State Engineer.

This memorandum on Federal Irrigation Water Rights goes much further than just asserting these rights within federal irrigation projects. The first sentence "The United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West." sets the stage. As just stated above, the United States claimed all of the unappropriated waters of the Rio Grande even though they had argued in this Court that the Rio Grande was a navigable river. But to claim all of the unappropriated waters according to this analysis the United States also had to be claiming that the Rio Grande was non-navigable. The Ward memorandum explains how the United States can use either argument navigable or non-navigable to gain the same results on federal reserved rights. The reason is stated just before the quote from the Rio Grande dam case on p.3. "Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law."

In other words, the lawyers for the United States have determined that their interpretation of the law is not subject to challenge in any court of law or by Congress because they have the absolute right to treat the public land states as being continuously under the territorial war powers. If the territorial war powers can be asserted against any State simply by saying it is for the Indians what is the difference in saying that the

same power exists in a slightly different analysis?

This Court was absolutely complicit in allowing the general reserved rights doctrine established in *Dred Scott v. Sandford*, to remove the future state interests of New Mexico. Just like Congress and the line of Presidents from Ohio that had learned how Edwin Stanton had reserved great powers to the United States through the 1871 Indian Policy, this Court played along with the new federal game of asserting the retained war powers as domestic law. As stated in the Summary of the Argument section of the brief, Indians were literally kidnapped off of two reservations and forced to live at the two dam sites to prevent construction by the Rio Grande Company. Using the Indians was the means to this unlimited power. Of course, it did not take the United States or this Court long to expand federal power into other newly discovered reserved federal ownership rights through Indian treaties or claims to unmentioned water rights vesting when Indian reservations were established. The Ward memorandum sets out in exacting detail how every law and decision by this Court through 1930 can be interpreted by the federal attorneys to further this federal interest. "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied, and could not be. United States v. Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. Winters v. United States, 207 U.S. 564, 577 (1908)." Ward Memorandum at p.8. The Ward memorandum then continues into how Section 8 of the Reclamation Act also does not change any of the federal reserved water

rights.

This Court knowingly and deliberately broke the rule of law as requested by the federal attorneys in the Rio Grande Dam cases. No longer did Congress exclusively exercise plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories become States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). From 1897 forward, any Secretary wielded even greater territorial war powers than Congress because they were completely unaccountable to the people or companies they harmed by altering legal processes. It was highly unlikely that anyone would ever find out how their justifiable expectations to a government process were altered because the information from the federal attorneys was and is privileged unless the documents have been placed into the public record in the National Archives. This was an unforeseen accident that these two memoranda after almost 100 years have now been found in released public files and can be used to question the very basis of the federal reserved rights doctrine.

### C. The Veeder Memoranda and the Nixon Indian Policy to Promote Tribal Rights

This *amici* brief will address only the first two of the Veeder memoranda recently found. Both were written by Veeder after he was fired from the Department of Justice (DOJ) sometime between 1965 and 1967. After he was fired from his long standing position with DOJ he was appointed first by President Lyndon Johnson as a special consultant to the Department of the Interior's Solicitor's Office. This special appointment was renewed by the Nixon administration. In fact, under the Nixon administration,

Veeder had an office in the White House and reported to Leonard Garment. Veeder was the main designer of the Nixon Indian policy according to the documents located by CERF. After the Nixon Indian policy was announced and presented to Congress Veeder turned on the Department of the Interior writing vehement memoranda that they were not doing enough to protect Indian rights.

The memorandum "Respecting Federal Trust Responsibilities For Managing Indian Forests with Points and Authorities in Support" dated September 19, 1968 explains how William H. Veeder interpreted the Indian trust relationship created by this Court to alter separation of powers principles. Attached to this Memorandum is his synopsis of the Indian Trust Responsibility. The second memorandum is a comprehensive explanation with points and authorities from William H. Veeder that is the legal basis of the Nixon Indian policy. It is titled "Implementation of Memorandum Respecting American Indian Reservation Economic Development Retarded or Thwarted Through Abridgement or Loss of Indian Titles to Land and Rights to the Use of Water by Policies, Agencies and Personnel of the Federal Government." This 126 page memorandum dated May 14, 1969 explains how any physical thing that can be claimed for the Indians can be subjected to federal authority.

There are several major differences in the way Veeder interpreted the Indian trust relationship. Many of these perspectives were attempted by the Obama administration and brought on the current concern over how tribal sovereignty is displacing federalism. But the Obama administration did not ever explain the basis of the reasoning. Starting with the "Indian Trust

Responsibility" document the very first paragraph sets the new position. The initial assumption is that the Constitution creates an *in praesenti* covenant with the Indians that is perpetual. The second paragraph is titled "The trust has been and must be fulfilled by the three great branches of the government." The objective of the trust in the ultimate is the betterment of the individual Indian for whom the covenant was entered into on both sides. It then explains that the trust is not a private trust but a government trust. Then the Executive authority for the fulfillment of the trust is said to be in the Secretary of the Interior who then is said to have broad discretionary power to meet the goals defined by this trust relationship. It ends with one paragraph applying these principles to the management of the Indian forests.

The attached memorandum is even more disturbing. Veeder bases his view of the constitutional covenant with the Indians squarely on *Worcester v. Georgia*, 31 U.S. 515, 546 (1832). He then cites *United States v. Kagama*, 118 U.S. 381 (1886). He states that the covenant with the Indians is the supreme law of the land under these rulings. He then begins to turn to how this is enforced through the Indian Commerce Clause incorporating elements from the Articles of Confederation into his interpretation. It then proceeds to explain how the Secretary of the Interior can exercise all of these constitutional powers based solely on his discretion to act on behalf of the Indians. He then claims that there is an enforceable standard of diligence that the tribes can enforce against the Secretary and government. The memo ends with specific recommendations for managing Indian forests and how that standard is to the level of a private trustee.

The title of the second memorandum sets the

stage: "Implementation of Memorandum Respecting American Indian Reservation Economic Development Retarded or Thwarted Through Abridgement or Loss of Indian Titles to Land and Rights to the Use of Water by Policies, Agencies and Personnel of the Federal Government." This memorandum also concerns the enforcement of the Indian Trust Responsibility document. The main point of this memorandum is that a separate federal corporation based on how the Tennessee Valley Authority was set up should be given the authority to exercise the constitutional covenant with the Indians to fully protect their property and rights. Specifically, Veeder recommends: "Congress should enact legislation which would place in an agency independent from the Department of the Interior and the Department of Justice the full responsibility for the protection, preservation, administration, development, adjudication, determination, and control including but not limited to all legal services required in connection with them, of the lands and rights to the use of water of the American Indian Reservations in western United States." P.1 of memorandum. The prime objective of his study is to find a way to avoid the conflicting interests of Congress, the Executive and personnel that prevent the full enforcement of the covenant with the Indians.

Counsel will summarize the main legal points for the sake of brevity. The memo transitions from respecting how the Indians view their own lands which should be respected and enforced against all to the argument that economic development of the reservations is to create a means of sustenance for the tribes for these rights. This argument for sustenance defines the term "trust property" as including the actual rivers, lakes and waterfronts as the source of sustenance for tribes using the resources of the

waterways. Memo at p. 12. From here Veeder continues into how the federal reserved rights doctrine can be further expanded to include this right to sustenance by making the federally reserved water rights actual trust property belonging to the tribes. Memo at p. 21. Pages are spent on how this Court's decision in *Arizona v. California*, 373 U.S. 546 (1963) established the basis for the tribes having a perpetual ownership interest in all waters for their sustenance. Going back to the broad trust established in *Worcester*, Veeder then argues that these federal reserved water rights and treaty rights are private and not public rights that must be administered as a priority. Memo at p.33. The memo continues by explaining how his definition of these private federally reserved water rights can be used to overcome riparian, prior appropriative and ground water rights conferred under state law. This section ends with a direct attack at federal-state relations.

On p. 49 Veeder starts over this time rewriting early American history to comport to his view of the constitutional covenant between the national government and Indians. This rewritten history is familiar because this is how the memorandum written for President Ford by Leonard Garment titled "What Level Tribal Sovereignty?" begins. CERF has been in possession of the sanitized version of the Veeder position since 2009 and has often cited it to this Court in previous *amicus* briefs. The next 65 or so pages of the Veeder memo explain how tribal sovereignty can be used to make the covenant a reality in our law again citing *Worcester v. Georgia* as the main authority. Unlike the Garment memo which promoted tribal sovereignty through the federal government, Veeder argues that the federal government can never be

trusted to fully pursue the Indian rights. Most importantly, Veeder is not making a tribal sovereignty argument. He is making a property rights argument and explains how the federal government interests conflict with those property rights. He spends 50 pages explaining why an independent federal corporation like the Tennessee Valley Authority run by the Indian tribes must be created to vindicate all tribal rights.

Veeder never really mentions the Indian Reorganization Act in the 126 pages of this memorandum on the massive expansion of the federal trust responsibility. William H. Veeder was a true believer in promoting and protecting Indian tribal rights. This is proven by the subsequent memoranda where he turns on the federal government for not protecting those rights and accuses the government of using the Indians for their own purposes. By suppressing the information on William H. Veeder and what he wrote for the United States government, the Executive branch has created a true Madisonian faction of a small cadre of federal attorneys promoting his expanded trust concepts while not allowing the full constitutional ramifications of his ideas to be disclosed. No wonder the Obama administration pursued these objectives on the waterways.[9]

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9 *See e.g.*, United States Department of the Interior Office of the Solicitor, *Memorandum – Reaffirmation of the United States' Unique Trust Relationship with Indian Tribes and Related Indian Law Principles*, M-37045 (Jan. 18, 2017) at p. 14 (discussing how the tribal trust obligation applies to the case at bar); United States Department of the Interior Office of the Solicitor, *Memorandum – Boundary of the Skokomish Reservation Along the Skokomish River*, M-37034 (Jan. 15, 2016). *See also* U.S. Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*,

## III. THIS COURT MUST FIND A WAY TO END THE MADISONIAN FACTION OF FEDERAL ATTORNEYS PROMOTING TRIBAL SOVEREIGNTY AGAINST ALL OTHER INTERESTS

For more than 20 years the Citizens Equal Rights Foundation (CERF) has been presenting *amici curiae* briefs to this Court requesting that this Court reexamine its prior cases granting plenary authority to the Congress and Executive branch over Indians under current federal Indian policy. Two terms ago, in several opinions this Court called into question the continuing plenary authority. One of those cases was *Sturgeon v. Frost*,136 S. Ct 1061 (2016). The Chief Justice himself warned the Ninth Circuit Court of Appeals in the unanimous opinion that further expanding the federal

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Office of the Spokesman (Dec. 16, 2010), available at: http://www.state.gov/r/pa/prs/ps/2010/12/153027.htm ("The decision to support the Declaration represents an important and meaningful change in the U.S. position, and resulted from a comprehensive, interagency policy review, including extensive consultation with tribes" (emphasis added)); The White House Office of the Press Secretary, *Remarks by the President at the White House Tribal Nations Conference* (Dec. 16, 2010), available at: https://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nationsconference; Krissah Thompson, *U.S. Will Sign U.N. Declaration on Rights of Native People, Obama Tells Tribes*, Washington Post (Dec. 16, 2010), available at: http://www.washingtonpost.com/wpdyn/content/article/2010/12/16/AR2010121603136.html.

reserved water rights doctrine would have great implications but did not articulate what those implications would be. The Ninth Circuit upon rehearing chose to ignore the warning and has greatly expanded the federal reserved water rights doctrine to now include full plenary authority under the Commerce Clause.

Similarly the Ninth Circuit has now declared the Point Elliot Treaty to include sustenance rights just as William H. Veeder set out for the Nixon administration's Nixon Indian Policy. The Nixon Indian policy as the continuation of the federal reserved rights conspiracy now completely dominates our law. Only this Court can fix how this trust and reserved power have been combined to do this. There cannot be a separate equity authority that protects only Indians. To continue to so hold continues the Madisonian faction that is destroying our Constitution just as President Nixon hoped would happen.

Ultimately the question is one of separation of powers that depends on how this Court defines the concept of judicial review, the very issue just addressed in *Patchak v. Zinke*. Since the Civil War this Court has allowed federal attorneys to define the Constitution and spoon feed to the Justices the legal result they want in a decision. This Court has allowed lawyers representing the United States to define what is good or bad for the national government instead of this Court deciding what is best for preserving self-government and the rights of the people. This Court needs to be like an architectural board deliberately and carefully protecting the structure of the Constitution that literally keeps our civil rights and liberties intact. The utter failure of this Court has allowed a steady increase of federal authority across anything a federal attorney

can claim as a federal interest. Former Justice Sandra Day O'Connor described this as the loss of individual liberty. There is no personal liberty when the Supreme Court always accepts that the federal government has an interest in any and all commercial activities. Very few things that any person owns or does today are not products or services in commerce.

This Court with the Civil War Amendments has had the ability to restore the rule of law and forever end the federal reserved rights doctrine by making all people equal before the law. This Court should at least revisit whether it had equity jurisdiction in *Worcester v. Georgia*.

## CONCLUSION

This Court should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,
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